

Draft - Issue Paper
Applicability of Voluntary Party Liability Exemption for
Certain Types of Solid Waste Facilities

Background

The Voluntary Party Liability Exemption (VPLE) statute allows most properties with discharges of hazardous substances to receive an exemption from state liability, if a person (i.e., the voluntary party) does: an assessment, investigation and remedial action of hazardous substances on a property. The liability exemption applies to the voluntary party, to successors (future property owners), and assigns. It exempts people from the Spill law (ch. 292, Wis. Stats.), as well as specific provisions in the hazardous and solid waste laws (chs. 289 and 291, Wis. Stats.) The person in possession of the property is required by the statute to maintain and monitor the property as required by the DNR, even after the certificate is issued. Many properties where spills have taken place also have some type of landfill or solid waste facility on the property, especially in southeastern Wisconsin.

Under current law (292.15(2)(d), Stats.) the exemption may not be obtained by a person if the property has a municipal waste landfill or approved facility on it. The reference to "...a municipal waste landfill, as defined in s. 289.01(22), Stats.," results in a very small universe of landfills covered by the exemption.

"Municipal waste landfill" (as defined in s. 289.01(22), Stats.) means a solid waste disposal facility that is **not** one of the following:

(a) A solid waste disposal facility designed exclusively for the disposal of waste generated by a pulp mill, paper mill, foundry, prospecting or mining operation, electric or process steam generating facility or demolition activity.

(b) A hazardous waste disposal facility. (another provision in s. 292.15, Wis.Stats., further defines the type of HW sites excluded from the VPLE).

Issue

This means that many of the small, unknown, historic fill sites that are found throughout Wisconsin -- that the Brownfields Study Group asked be addressed in the Building on Abandoned Landfill Guidelines--would not be eligible under the VPLE. That is because they are considered to be municipal waste landfills. Expanding the types of solid waste sites eligible for coverage by the exemption may be advantageous to brownfield redevelopment efforts. Many contaminated sites with industrial discharges also have some areas of fill on the property, which may be a "municipal waste landfill" under this definition. A strict read on the law would exclude these types of sites from obtaining a Certificate of Completion, even if the "landfill" has been adequately investigated and remedial action has been taken to limit any exposure and releases from the waste.

At the August 25 meeting of the Cleanup Issues sub-group, this issue was discussed. The Study Group members present were supportive of examining how to modify the existing VPLE law so that more brownfields properties, including those with landfills, can be included in the VPLE process. Generally, the study group members present

indicated that a landfill should be eligible for the VPLE, without legal limits (e.g., they did not favor limiting it based on landfill types, such as licensed, or approved, or municipal waste landfills). They believed that the deciding factor on which landfills should be able to participate in VPLE should be based on which landfills could technically achieve a Spill-like closure.

Recent discussions between the DNR's Bureaus for Waste Management (WA) and Remediation and Redevelopment (RR) have identified several issues that the study group may wish to consider:

- 1) The universe of landfill/solid waste sites to include (or exclude) under the VPLE exemption; and
- 2) The "technical" limits of the exemption, specifically the technical and environmental requirements that a solid waste landfill would need to achieve to receive the VPLE certificate.

These 2 issues are discussed in the following sections:

Options

1) What universe of landfill/solid waste sites should be eligible or ineligible for the VPLE certificate?

As previously discussed, the current language in the law is very narrow, because it excludes "municipal waste landfills" and "approved facilities." (The only landfills eligible are pulp mill, paper mill, foundry, prospecting or mining operation, electric or process steam generating facility or demolition activity landfills. It also allows some types of hazardous waste landfills). Many of the historic fill sites likely to be encountered during the redevelopment of brownfields would not be covered by the VPLE because they fall within the definition of municipal waste landfills.

Options for which type of landfill sites should be allowed to participate in the VPLE process:

- A. All sites with any type of solid waste facility or landfill. One option would be to allow any properties with landfills to potentially qualify for the VPLE, assuming that there is a discharge of a hazardous substance to the environment. This option is premised on the belief that it may not be technically feasible for many of these complicated landfills to ever meet the appropriate technical requirements and environmental standards, which are required to obtain closure and a Certificate of Completion. However, to include or exclude landfills based on artificial definitions (e.g., approved, licensed, etc.) may exclude many properties from participating in the VPLE process.
- B. Approved facilities (sites with approved plans of operation developed after 1975) are currently excluded from the VPLE. The initial reaction of the Waste Management program is that the Study Group may want to keep these sites out of the VPLE process. There are approximately 100+ of these sites in the state. The size, complexity, and O&M requirements for these sites make them more difficult for the property owners and DNR to deal with, and thus less likely to obtain a certificate.

- C. Licensed facilities may be too broad a category to exclude from coverage. There are approximately 1000 sites in the state that have been or currently are licensed. They range from small, uncontrolled sites from the late 1960's, to the modern, mega-sites of today. The common factor is that the DNR has had some level of involvement with the site, although not uniform, over time.
- D. Historic fill sites are landfills that were developed before 1970 that have not been licensed by the DNR. Many of these sites are the types that could be encountered unexpectedly through property acquisition and brownfields redevelopment. These are types of sites at which little is known, and responsible parties may be very difficult to identify. The law excludes many of these sites.

Study Group Recommendation:

2) What "technical and environmental" requirements would a voluntary party need to satisfy with respect to a landfill in order to qualify for the VPLE?

The current requirements that need to be met in order to qualify for the VPLE are listed in s. 292.15(2), Wis. Stats. The most relevant requirements are that:

- An environmental investigation of the property is conducted that is approved by the department.
- The environment is restored to the extent practicable with respect to the discharges and the harmful effects from the discharges are minimized in accordance with rules promulgated by the department
- The voluntary party maintains and monitors the property as required under rules promulgated by the department

If the Study Group proposes to change the types of landfills that can participate in the VPLE process, how these 3 requirements would apply to landfills may need further clarification. Generally, for a Spill site to receive the exemption, the department must approve the site investigation, per ch. NR 716, and the final cleanup per ch. NR 726. For a Spill site, this would mean that:

- the active, engineered treatment system can be shut down,
- adequate source control has been conducted
- groundwater has met standards or the natural attenuation performance standard of a stable or receding plume has been demonstrated
- residual soil conditions are protective based on landuse
- engineering controls, if needed, are in place and a commitment is there to maintain
- any deed restriction or registry notification has been done
- groundwater monitoring wells are or can be abandoned

Because of the broad variability of the type of landfills one can encounter, many landfills have active, long-term engineered systems in place, such as engineered caps, methane systems, leachate collection and treatment systems, and long-term groundwater monitoring. In other case, all that may be necessary at a "landfill" is an exposure barrier (i.e., a cap) to prevent direct contact exposures.

Options for what "technical and environmental" requirements a voluntary party would need to satisfy with respect to a landfill in order to qualify for the VPLE:

1. Meet same conditions as Spill Site: Require that any landfill would need to meet the same cleanup/closure standards as a Spill site. They must be able to demonstrate, over a reasonable period of time, that turning off the active treatment system, will result in achievement of environmental standards. Thus, the leachate and methane systems are no longer needed, nor is groundwater monitoring no longer needed. If they can adequately demonstrate this, and can close it out like a Spill site, they should receive the VPLE.
2. Allow the VPLE even if active systems are in place, but they can meet ch. NR 726 closure standards: Many landfills with active treatment and engineered systems can meet our ch. NR 726 closure requirements, *if and only if* they leave those active systems in place. So a landfill with a leachate collection and treatment system, may be capped and be able to meet the ch. NR 140 groundwater standards. Should these sites with active systems be allowed to obtain a VPLE certificate?

Brownfield Study Group recommendation:

Other related, technical issues:

3. DNR approval for building on an abandoned landfill. DNR staff recommend that this requirement be applicable to properties pre- and post-VPLE certificate. If someone plans to build on a landfill, they need to have the proper DNR approvals (e.g., there is no methane concerns), whether they are needed prior to or after issuance of a certificate.
4. Engineering control maintenance. As with Spill sites, the only necessary maintenance requirement may be to maintain a cap over the landfill. Should we allow the Certificate of Completion to be issued, as long as the certificate clearly states that the exemption is conditioned on maintenance of the cap and that restriction is recorded on the deed (like a Spill site)?

Brownfields Study Group Recommendation:

Next Steps -

After these issues are discussed with the Brownfields Study Group, recommended statutory changes will be prepared to modify the existing law as directed by the Study Group.